FILED
MAR 16 1992
OFFICE OF THE CLERK

(13)

No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Printed by Authority of the State of Illinois (P.O. 35398—60—3-16-92)
PETITION FOR WRIT OF CERTIORARI FILED APRIL 29, 1991
CERTIORARI GRANTED DECEMBER 16, 1991

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ARGUMENT

I.

THE CHALLENGED ILLINOIS LICENSING ACTS DO NOT DISPLACE CURRENT OSHA STANDARDS, BUT ONLY OPERATE TO ESTABLISH COMPETENCY REQUIREMENTS FOR HAZARDOUS WASTE WORKERS.

The Respondent and the Solicitor General equate the challenged Illinois licensing acts with an OSHA state plan. In so doing, they cast Illinois' attempt to enforce these licensing acts as an attempt to circumvent the requirements of the OSH Act by implementing a state plan without first obtaining approval from the Secretary of Labor ("Secretary"). The Illinois licensing acts do not displace any of the standards in effect in Illinois enforced by OSHA. Rather, Illinois, recognizing that hazardous waste work presents considerable danger to the public as well as to the workers themselves, seeks to establish a minimum level of competency for laborers and crane operators who wish to engage in such work in Illinois.

II.

THERE IS NO EXPRESS PREEMPTION LANGUAGE IN THE OSH ACT.

This Court's precedent recognizes express preemption only where Congress uses explicit preemptive language in the text of the statute. *Wisconsin Public Intervenor v. Mortier*, 115 L.Ed.2d 532, 543 (1991). In this case, Congress did not include explicit preemptive language in the OSH Act. Indeed, the Solicitor General candidly admits that the OSH Act does not include statutory language that directly preempts supplemental state regulation. (Sol. Br. 12). Respondent likewise concedes that the OSH Act

lacks "specific prohibitory words." (Resp. Br. 18). Nevertheless, both the Respondent and the Solicitor General insist that the language of the OSH Act expresses Congress' intent to preempt supplemental state worker safety regulation. (Sol. Br. 12; Resp. Br. 14, 26). Respondent and the Solicitor General urge this Court to find that a proper construction of Section 18 expressly preempts supplemental state law by "negative inferences" (Resp. Br. 18) and "negative implication." (Sol. Br. 13). Respondent and the Solicitor General would have this Court create a new category of express preemption even where Congress did not use specific prohibitory words. In effect, they ask this Court to "infer" express preemption.

Respondent asserts that Section 18(a) "explicitly limits" states' authority to regulate worker health and safety to "areas not subject to an OSHA standard." (Resp. Br. 14). According to Respondent and the Solicitor General, any other reading of Section 18(a) would render it surplusage. (Resp. Br. 15; Sol. Br. 13). In fact, Section 18(a) states that "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. §667(a). Section 18(a) does *not* state that if there is a federal standard, then state law is preempted. *See National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 685 (7th Cir. 1990, Easterbrook, J., *dubitante*) (Pet. App. 34). Section 18(a) simply does not contain a congressional expression of intent to preempt or to save supplemental state occupational regulation. Nevertheless, the expressed anti-preemption provision of Section 18(a) is not surplusage and should be given full effect to save state worker safety regulation of matters not covered by OSHA standards.

III.

THE OSH ACT DOES NOT IMPLIEDLY PREEMPT SUPPLEMENTAL STATE LAW.

A. The Illinois Licensing Acts Do Not Conflict With The OSH Act.

Respondent contends that the Illinois licensing acts conflict with the OSHA hazardous waste standard because an employee who meets the minimum requirements of the OSHA regulation will not automatically qualify for an Illinois license. Respondent further argues that the Illinois licensing acts frustrate the purpose of Congress because they supplement OSHA regulation.

Actual conflict is established either where "compliance with both federal and state regulation is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Respondent attempts to establish conflict by pointing out differences between Illinois' requirements and the OSHA requirements. Specifically, Respondent notes that OSHA exempts workers with equivalent training or experience from the minimum training requirements while Illinois requires every worker to complete the training. (Resp. Br. 31). The fact that Illinois requires every worker to have training does not make compliance with OSHA requirements a "physical impossibility."

Respondent also stresses that Illinois requires hazardous waste crane operators to possess 4,000 hours of experience operating equipment used on hazardous waste sites while OSHA does not. (Resp. Br. 32). Again, it is physically

possible for workers to comply with both the OSHA training requirements and the Illinois experience requirement. Respondent has merely shown that the Illinois licensing acts and OSHA regulations are not identical; however, because it is physically possible to comply with both, these differences do not amount to actual conflict as required under this Court's well settled preemption analysis.

In addition, Respondent contends that, unlike OSHA regulation, the Illinois licensing acts do not permit the requisite flexibility in emergency response operations. (Resp. Br. 32). Because Respondent challenged the Illinois licensing acts before the Illinois Environmental Protection Agency ("IEPA") had the opportunity to implement them, Respondent can only speculate that the IEPA will not provide for sufficient flexibility. Yet, it is not enough to speculate that a conflict may arise. This Court has admonished:

> We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961).

Goldstein v. California, 412 U.S. 546, 555 (1973) (emphasis in original); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (stating that a conflict must exist as the laws are "interpreted and applied, not merely as they are written").

Indeed, a preliminary draft of the IEPA proposed rules implementing the Illinois licensing acts provides that

workers engaged in certain emergency response operations are not required to be licensed. (R. Doc. 57, Exh. A, §865.305). In this facial challenge to the Illinois licensing acts, Respondent can only establish an actual conflict if Respondent can demonstrate that there is no possible way in which the IEPA could implement the Illinois licensing acts that would avoid a conflict with the OSHA regulation. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). Because the IEPA could implement the Illinois licensing acts flexibly in emergency response operations by adopting its proposal to exempt emergency response workers from the licensing requirements, there is no evidence that Illinois' implementation will conflict with OSHA regulation.

Finally, Respondent contends that Illinois' licensing acts will conflict with the OSHA mandated buddy system. (Resp. Br. 33). All that is required by the buddy system pursuant to OSHA is that each employee of the work group be designated to be observed by at least one other employee in the work group. 29 C.F.R. §1910.120(a)(3). Certainly, it is physically possible for Illinois licensed employees to comply with this requirement.

B. The Illinois Licensing Acts Do Not Frustrate The Purpose Of The OSH Act.

Respondent also asserts that the Illinois licensing acts frustrate the purpose of Congress because they supplement OSHA regulation. Respondent interprets the OSH Act as an employer protection law whose purpose is to eliminate overlapping and duplicative regulations in order to free employers and employees from more than the bare minimum regulation. (Resp. Br. 21-22). This interpretation completely overlooks the OSH Act's expressly stated purpose. Congress declared that the purpose of the OSH Act

is "to assure so far as possible to every working man and woman in the nation safe and healthful working conditions. . . ." 29 U.S.C. §651(b).

In support of its position, Respondent cites 29 U.S.C. §653(b)(1) & (3) and 29 U.S.C. §657(d) of the OSH Act, and 29 U.S.C. §655 note (f) of SARA. However, these provisions do not stand for the propositions that Respondent suggests. First, §653(b)(1) provides that the new OSHA regulations shall supersede existing federal regulations that are less protective of worker safety but not existing federal regulations that are more protective of worker safety. As a result, existing federal regulations promulgated pursuant to various other federal acts which are more protective of worker safety will remain in force and effect and overlap the new OSHA standards. Indeed, a correct reading of §653(b)(1) demonstrates that Congress was not troubled by overlapping regulation when the overlap furthered its purpose of promoting worker safety.

Second, §653(b)(3) directs the Secretary to recommend legislation to reduce duplication and to achieve coordination between OSHA standards and those of the other federal acts. This provision reflects Congress' recognition that enactment of the OSH Act would create duplicative federal regulations which could be reduced by future legislative action. It does not reveal a federal purpose to eliminate duplicative regulation via the OSH Act.

Also, contrary to Respondent's assertion, §657(d) does not relate to regulation of worker safety but to the gathering and compiling of information by the Secretary of Labor and the Secretary of Health and Human Services and the state agencies. These governmental officials are directed to coordinate their efforts to avoid unnecessary duplication in the gathering of information. This section does *not* address duplication of worker safety regulation. Congress

could have, but did not, direct these governmental officials to avoid duplication in worker safety regulation as it did with regard to information gathering in §657(d).

Finally, Section 126(f) of SARA, 29 U.S.C. §655 note (f), does not address duplicative regulation. This section of SARA directs the United States Environmental Protection Agency ("USEPA") Administrator to promulgate worker safety protection regulations adopting the OSHA regulations mandated by Congress to cover state and local governmental employees who are not covered under the OSH Act. The regulations adopted by the USEPA would not preempt supplemental state regulation of state and local governmental employee occupational safety. If Congress was intent upon preempting supplemental state regulation as Respondent insists, Congress would have given preemptive effect to the parallel EPA regulations which it clearly did not.

In the Solid Waste Disposal Act, 42 U.S.C. §6901 *et seq.*, Congress directed the USEPA Administrator to promulgate "regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste . . . as may be necessary to protect human health and the environment. . . . Such standards shall include . . . training for personnel." 42 U.S.C. §6924(6). The personnel training requirements promulgated by the USEPA Administrator pursuant to this directive are codified at 40 C.F.R. §264.16 and 40 C.F.R. §265.16. They require the facility owners and operators to implement training programs that at a minimum ensure that facility personnel are able to respond effectively to emergencies. The employees required to be trained under these regulations are clearly employees covered by the OSHA hazardous waste operations standard. 29 C.F.R. §1910.120(a)(iv). Thus, Respon-

dent's contention that the congressional purpose underlying the OSHA hazardous waste operations standard was to eliminate overlapping regulation of hazardous waste workers is defeated by the fact that Congress itself mandated overlapping training in the Solid Waste Disposal Act.

Illinois has final authorization to implement its own program in lieu of the federal program pursuant to §6926(b) of the Solid Waste Disposal Act. 40 C.F.R. §272.700 (1991). Accordingly, Illinois has promulgated its own personnel training requirements to comply with the congressional directive of §6924(6). *See* 35 Ill. Admin. Code, ch. I, §724.116 (1985). These congressionally authorized Illinois employee training regulations supplement the training required by the OSHA hazardous waste operations standard. Congress clearly did not intend to preempt with the OSH Act that which it expressly required pursuant to the Solid Waste Disposal Act. Yet, that is the position that the Respondent and the Solicitor General advocate.

Illinois' licensing acts, which promote worker safety as well as public safety and environmental protection, further Congress' purpose of providing "every working man and woman in the nation safe and healthful working condition." 29 U.S.C. §651(b). Because they do not frustrate Congress' purpose underlying the OSH Act, the Illinois licensing acts are not preempted.

C. Federal Control Over All Worker Safety Regulation Is Not A Purpose Of The OSH Act.

The Solicitor General contends that Section 18 of the OSH Act reflects Congress' desire to vest the Secretary of Labor with exclusive control over the regulation of worker safety. (Sol. Br. 18-19). He suggests that this goal of ensuring exclusive federal control preempts states from

supplementing OSHA worker safety regulation. The language and structure of the OSH Act do not support the Solicitor General's theory. The OSH Act gives the Secretary control only to insure minimum standards nationwide. The OSH Act does not give the Secretary exclusive control over occupational regulation that goes beyond the minimum national requirements.

For example, Section 18(a) openly invites the states to assert jurisdiction over occupational health and safety issues not covered by specific OSHA standards. The Secretary retains no control over independent state legislation pursuant to this section.

Nor does the OSH Act provide for exclusive OSHA control over occupational safety and health issues covered by specific OSHA standards. Petitioner has already pointed out that the OSH Act does not preempt Illinois' training requirements applicable to employees at hazardous waste treatment, storage, and disposal facilities governed by the Solid Waste Disposal Act. In addition, as the Solicitor General concedes, a state is free to require safety regulations in excess of those prescribed by OSHA pursuant to a state plan. (Sol. Br. 17). The Secretary does not have authority to reject a state plan that is at least as effective in promoting occupational safety as the OSHA standards. 29 U.S.C. §667(c). Therefore, if Illinois were to submit a state plan meeting the minimum OSHA requirements and in addition providing for requirements identical to those contained in the Illinois licensing acts, the Secretary would not have authority to reject Illinois' licensing requirements.

Alternatively, Illinois could submit a plan that meets the OSHA requirements, which the Secretary would be required to approve, and then separately enact the Illinois

licensing acts. Pursuant to 29 U.S.C. §667(f), the Secretary retains authority to evaluate state enforcement of approved state plans. However, this section does not give the Secretary control to preclude separate state legislation which supplements the OSHA approved state plan.

The structure of the OSH Act demonstrates only that Congress intended to give the Secretary control to ensure that the minimum worker protection requirements are met in every state. The fact that states with OSHA approved state plans have free reign to supplement or add to their OSHA approved state plans completely undermines the Solicitor General's argument that by enacting the OSH Act, Congress intended to vest exclusive control over all occupational health and safety regulation in the Secretary.

Since Illinois is not a state plan state, OSHA retains control to ensure that minimum occupational safety requirements are met through direct enforcement of the federal occupational standards. The Illinois licensing acts do not interfere with the control given to OSHA by Congress.

IV.

CONGRESS DID NOT DELEGATE AUTHORITY TO THE SECRETARY TO PREEMPT SUPPLEMENTAL STATE LAW UNDER THE OSH ACT.

The OSH Act directs the Secretary to promulgate minimum occupational health and safety standards, 29 U.S.C. §655, and to approve state plans which are at least as effective in promoting occupational safety. 29 U.S.C. §667. The OSH Act does *not* confer power on the Secretary to preempt supplemental state regulation of worker safety. This Court has held that "a federal agency may preempt state law only when and if it is acting within the

scope of its congressionally delegated authority." *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). In this case, the OSH Act only delegates authority to the Secretary to preempt state law that is less protective of worker safety than the OSHA standards.

The Respondent and Solicitor General assert that the Secretary has interpreted Section 18(a) of the OSH Act to preempt supplemental state law, and that this Court should defer to the interpretation of the Secretary. (Resp. Br. 26-28; Sol. Br. 22-23). However, "an agency literally has no power to act, let alone pre-empt a validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.*, 476 U.S. at 374. It is significant that Section 18(a) is not a congressional delegation of authority to the Secretary, but rather an express limitation on the Secretary's authority to preempt state law.

"[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.* This examination involves the balancing of policies of federalism. This Court has explained that "in questions relating to the allocation of power between the Federal and State Government . . . we heed the command of Congress without any special deference to the . . . [agency's] interpretation of that command." *North Dakota v. United States*, ____ U.S. ____, 110 S.Ct. 1986, 1999 (1990). Accordingly, this Court should give no deference to the Secretary's reading of Section 18(a) of the OSH Act. This Court's traditional preemption analysis should be applied in this case, including the presumption that state health and safety regulation is not preempted absent a clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

V.

THE SECRETARY OF LABOR DID NOT INTEND TO PREEMPT SUPPLEMENTAL STATE LAW WITH THE PROMULGATION OF THE OSHA HAZARDOUS WASTE OPERATIONS STANDARD.

Even if Congress did delegate authority to the Secretary to preempt supplemental state regulation, the Secretary did not attempt to exercise that authority in the promulgation of the hazardous waste operations standard at issue in this case. The Secretary would have expressly stated that the hazardous waste standard preempted supplemental state law if that were her intention. For example, in the hazardous communications standard the Secretary expressly stated her intention to preempt supplemental state law. 29 C.F.R. §1910.1200(2) (1991) (stating that the standard is intended ". . . to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject."). Both the Respondent and the Solicitor General acknowledge that the hazardous waste operations standard does not contain language expressly preempting supplemental state law. (Resp. Br. 28; Sol. Br. 18, n. 7).

The absence of explicit preemptive language in the OSHA hazardous waste operations standard is particularly significant in light of a longstanding OSHA Instruction which provides that, "[p]rograms designed to provide training and consultative services for employers and employees may be continued by State agencies" in states without OSHA approved state plans. (OSHA Instruction STP 2-1.10A (D)(1), Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶5008.71). The 40-hour training requirement of the Illinois licensing acts is precisely designed to provide training for employees. Thus, the Secretary did not intend to preempt the training provisions of the Illi-

nois licensing acts by promulgating the hazardous waste operations standard.

VI.

THE OSH ACT DOES NOT PREEMPT NON-CONFLICTING DUAL PURPOSE STATE LAWS.

A. Congress Did Not Intend To Preempt State Laws With Environmental Protection And Public Safety Purposes.

The Respondent contends that the non-occupational safety purposes and effects of the Illinois' licensing acts are irrelevant to the preemption question, and that the only relevant consideration is whether the licensing acts affect worker safety. (Resp. Br. 41-42). Since the Illinois licensing acts affect the safety of hazardous waste workers who are covered by the hazardous waste operations standard, albeit in a positive way, Respondent concludes that they are necessarily preempted by the OSH Act. This approach completely discounts the possibility that Congress may have intended to limit the extent of the OSH Act's preemptive effect and thereby permit states to continue to regulate public safety and environmental concerns.

The intent of Congress governs not only the existence of federal preemption, but also the extent of the preemption. *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 510 (1989). As the Solicitor General noted, Congress did not intend the OSH Act to regulate environmental protection and public safety. (Sol. Br. 23, n. 13). The Solicitor General further noted that the Secretary has expressly stated that her authority under the OSH Act does not extend to any matters beyond occupational safety. (Sol. Br. 22, n. 12, citing 29 C.F.R. §1910.5(d)). Because in enacting the OSH Act Congress did not attempt to regulate public safety and environmental protection, it follows that Congress did not

intend to preempt supplemental state laws that protect the public and the environment. Therefore, if this Court concludes that Congress intended to preempt supplemental state regulation, that preemption should not extend to supplemental state laws that promote public safety and environmental protection merely because they also promote occupational safety.

If this Court finds a congressional intent to preempt supplemental state occupational safety and health laws but not supplemental public safety and environmental protection laws, then the additional purposes and effects of the Illinois licensing acts become relevant to the preemption analysis. It becomes necessary to examine the purposes and effects of the Illinois licensing acts in order to determine whether they are impermissible occupational safety regulation, or whether they are permissible public safety and environmental protection laws.

Contrary to the contention of the Respondent and the Solicitor General, (Resp. Br. 41-42; Sol. Br. 26), there is nothing novel or abhorrent in identifying the purposes and effects of a state law in order to determine if it is a law that Congress intended to preempt. This Court, in *Northwest Pipeline*, looked to the purpose of a Kansas law in order to determine whether or not it was preempted. Even though this Court found that Congress intended to preempt state regulation of the sale and transportation of natural gas in interstate commerce, it did not preempt Kansas' regulation despite the fact that it impacted upon these matters. 489 U.S. at 510. Because the Kansas regulation was "plausibly related to its stated and legitimate goal" of regulating production, this Court upheld the Kansas regulation. 489 U.S. at 518.

It is a stated and legitimate goal of the Illinois licensing acts to reduce the danger that work on hazardous

waste sites poses to public safety and the environment. The reasonable means by which Illinois attempts to reduce the dangers posed by work done on hazardous waste sites is to require the persons who perform that work to possess a greater level of competency. Thus, the Illinois licensing acts are plausibly related to their goal of promoting public safety and protection of the environment. Accordingly, this Court should not preempt Illinois' licensing acts, notwithstanding the fact that they also impact upon worker safety.

Furthermore, as the Solicitor General points out in his brief, a longstanding Instruction of OSHA provides that "state enforcement of standards which on their face are predominantly for the purpose of protecting a class of persons larger than employees" are not affected by OSHA standards. (Sol. Br. 22, n. 12, *citing* OSHA Instruction STP 2-1.10A(F)(1) (Mar. 13, 1981)). This Instruction demonstrates that OSHA looks to the purpose of a state law when it analyzes whether the state law is preempted by its standards. On their face, the Illinois licensing acts protect public safety as well as worker safety and, thus, have a purpose of protecting a class of persons larger than employees. Hazardous waste operations often involve only a small number of workers, yet these operations frequently pose a danger to a large number of residents in the surrounding community. Hazardous waste employees constitute only a small portion of the class of persons protected by the Illinois licensing acts. Therefore, OSHA would not interpret Congress' intent to preempt supplemental state law to extend to Illinois licensing acts.

The Solicitor General takes the position that OSHA preempts any state law "relating to" an occupational safety and health issue covered by an OSHA standard. (Sol. Br. 26). In effect, the Solicitor General attributes to the OSH

Act the same breadth of preemption that Congress provided for in the Employee Retirement Income Security Act ("ERISA"). In ERISA, Congress expressly stated: "Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. §1144(a). This Court has labelled the breadth of the ERISA preemption clause as "virtually unique." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n. 26 (1983). Even the Respondent concedes that Section 18 of the OSH Act does not reflect a broad intent to supersede state law comparable to that expressed in ERISA. (Resp. Br. 45).

B. A Wide Variety Of State Public Health And Safety Legislation Would Be Preempted By The Respondent's And The Solicitor General's Test For OSHA Preemption.

The Solicitor General assures this Court that his interpretation of Section 18 preemption would not result in the preemption of other state licensing acts, building codes, fire marshal regulations, and seat belt laws "because these state standards do not aim to protect workers as a class and do not have that primary effect." (Sol. Br. 24, n. 14). The fact that the Solicitor General argues that these state laws are not preempted reflects his recognition that Congress did not intend for OSH Act preemption to sweep so broadly in areas of public safety regulation. Because the Solicitor General cannot dispute the fact that these state laws promote worker safety in areas where OSHA regulates and, thus, have a direct and substantial effect on the federal regulation, he contends that they fall outside of OSHA preemption because their *aim* is not to protect workers as a class. In reaching this conclusion, the Solicitor General focuses on the purpose of

the state regulations. Yet, he urges this Court to reject the preemption tests of the First, Second, and Third Circuits precisely because those tests consider the purpose of the state law. (Sol. Br. 26). The Solicitor General does not offer this Court any workable test to prevent OSHA preemption from extending far beyond Congress' intent.

The Respondent acknowledges that OSHA has promulgated standards that regulate medical personnel and electricians, electrical installations and seat belt requirements, as well as civil and criminal penalties for violations of specific standards. Nevertheless, Respondent assures this Court that Illinois will remain free to license medical personnel and electricians, enact building codes and seat belt laws, as well as enforce its tort and criminal laws because these state laws do not directly, clearly and substantially affect the federal scheme under the OSHA standard. (Resp. Br. 44-46). However, the test under which the Seventh Circuit preempted the Illinois licensing acts was whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of "worker health and safety," (Pet. App. 19), as opposed to whether the state law affects the "federal scheme."

Local building code authorities that have adopted the National Electrical Code promote worker safety. As Respondent notes, OSHA has praised the National Electrical Code for the substantial role that it has played in the protection of worker safety. (Resp. Br. 46, n. 38). Likewise, state fire marshal regulations requiring sufficient and clearly labelled exits in factories affect worker safety in a significant respect. These state regulations do not affect the federal scheme, but do constitute, in a direct, clear and substantial way, regulation of worker health and safety. Thus, contrary to Respondent's assurances, these

state regulations would be preempted under the Seventh Circuit's preemption test.

In Respondent's eagerness to escape the requirements of the Illinois licensing acts, Respondent would have this Court interpret the OSH Act to bar legitimate state public safety and environmental protection laws. However, "[t]o avoid encroachment on the powers Congress intended to reserve to the states," this Court must be careful that it does not " 'by an extravagant . . . mode of interpretation' " extend powers granted to the federal agency to include powers left to the states. *Northwest Pipeline*, 489 U.S. at 512, *citing FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513-14 (1949). Illinois' attempt to protect the public and the environment by means of the challenged licensing acts should not be preempted merely because they also further the OSH Act purpose of protecting workers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals which declared the Illinois licensing acts preempted by Section 18 of the OSH Act.

Respectfully submitted,

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